Supreme Court, U.S.
FILED
JUL 27 2006
OFFICE OF THE CLERK

No. 05-1586

In the Supreme Court of the United States

DENNIS A. REID,

Petitioner,

v.

ALENIA SPAZIO, S.P.A. AND FINMECCANICA, S.P.A.,

Respondents.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of Texas

REPLY BRIEF FOR PETITIONER

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Alenia's brief in opposition raises a variety of factual and legal arguments. As explained below, however, none has merit and the petition should be granted.

A. Alenia's factual claims raise issues that have already been decided against it as a matter of state law.

In the trial court, Alenia filed a special appearance, which was denied. App. 1. Under state law, that denial meant that all facts supporting the trial court's ruling were found in petitioner's favor if supported by some evidence. App. 6. As relevant here, the primary facts supporting specific jurisdiction were that that Alenia had formed a joint venture with USRT; that USRT had been a Texas-based business through August 1999; that Alenia had cultivated its relationship with USRT by in-forum negotiations, forum-directed communications, and a loan of operating funds; that Alenia had developed a plan to bribe USRT's management in May 1999 as part of a larger plan to oust USRT from the venture; and that Alenia had further breached its fiduciary duties to USRT by launching a satellite without USRT in late 1999 before purportedly canceling any joint venture agreement between the parties. Pet. 2-5.

On appeal, Alenia disputed the evidentiary sufficiency of the findings supporting the trial court's judgment. App. 6-7 & n.4, but the court of appeals did not find that any of the above facts were unsupported by sufficient evidence under state law. Most notably, the court of appeals did not overturn the trial court's finding that Alenia was part of a conspiracy to oust USRT from the joint venture, which is unsurprising given petitioner's direct evidence of this fact based on statements of Siniscalchi himself. Alenia continues (at 6, 14) to describe this evidence as hearsay, but statements of party opponents and co-conspirators are not hearsay under either state or federal law, see TEX. R. EVID. 801(e)(2); FED. R. EVID. 802(d)(2), and the court of appeals did not hold otherwise.

The court of appeals did decide that USRT lacked any Texas operations after August 1999, App. 11-12, and that there was no evidence that Alenia *itself* offered a bribe to USRT's president Jon Reed. App. 16, but petitioner does not

dispute those determinations. Rather, as previously discussed, Pet. 17-18, and further discussed below, *infra* B.1.c, they merely reveal the outcome determinative nature of the court of appeals' initial refusal to give any jurisdictional significance to Alenia's participation in the underlying conspiracy.

Because Alenia failed on state law grounds to overturn the primary trial court findings favoring petitioner, those findings are final and Alenia cannot re-litigate them here, as it seeks to do throughout its brief. Moreover, because those fact issues cannot be re-litigated here, this case presents an ideal vehicle for reviewing the relevant personal jurisdiction issues the court of appeals actually decided, which include several unresolved issues of federal law as discussed below.

B. Alenia's legal arguments in opposition to the petition lack merit.

1. Petitioner's conspiracy issues are preserved, implicate two splits of authority, and are outcome determinative on the merits.

a. ***Preservation.*** Alenia does not dispute that Texas law extends state court jurisdiction to the limits of federal due process, see *Coleman*, 83 S.W.3d at 806, or that the overarching question presented (whether Texas may assert personal jurisdiction over Alenia in this litigation) poses a substantial federal question. Alenia also does not dispute that this federal question was raised and decided in the trial court and court of appeals or that petitioner challenged the court of appeals' negative resolution of that question through a petition for review with the Supreme Court of Texas. Rather, what Alenia claims (at 10-13) is that one subpart of this question – whether courts may ignore a defendant's imputed or actual participation in a conspiracy to harm a forum business – is not properly before this Court because it was not raised in the two lower appellate courts. Alenia's contention is mistaken for the following reasons.

As a threshold matter, Alenia conflates the relevant federal claim (that Texas may assert personal jurisdiction over Alenia) with one of several arguments that can be made in support of it

(that Alenia was involved in a conspiracy to harm a Texas business). As a procedural matter, this distinction makes a difference because a litigant who has raised a federal claim in state court is not limited in this Court to arguments previously made in support of it. See *Illinois* v. *Gates*, 462 U.S. 213, 220 (1983) (quoting rule from *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899), that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed" if the new arguments are so connected to the same federal question as to "form but another ground or reason for alleging the invalidity of the [lower court's] judgment"). That said, there are prudential reasons for this Court to prefer cases where both the federal claim and relevant arguments were presented below. As next explained, however, that prudential concern is met here as well.

Because the Supreme Court of Texas denied discretionary review in this case, the judgment under review is that of the court of appeals. See 28 U.S.C. § 1257(a); *American R. Express Co.* v. *Levee*, 263 U.S. 19, 21 (1923). In that court, Alenia claimed on appeal that Texas could not assert specific jurisdiction over it under federal due process standards. Br. of Appellants 15-16, 17-26. In opposition, petitioner argued that Alenia was subject to personal jurisdiction because, among other reasons, it had "conspir[ed] to usurp the joint venture partnership's business opportunities." Br. of Appellee 26. In deciding the overarching federal claim, the court of appeals held that it could not give jurisdictional significance to Alenia's imputed participation in such a conspiracy based on *Nat'l Industrial Sand Ass'n* v. *Gibson*, 897 S.W.2d 769 (Tex. 1995) (orig. proceeding), App. 15-16, a decision resolved on federal due process grounds. The court of appeals further held that it could not give jurisdictional significance to Alenia's actual participation in a conspiracy and claimed (at App. 16 n.12) that its resolution of that issue was consistent with *Calder* v. *Jones*, 465 U.S. 783 (1984), also decided on federal due process grounds.[1] Thus, even if one focuses on

[1] More generally, since Texas law extends the jurisdiction of state courts to the limits of federal due process, every personal jurisdic-

the arguments made in support of petitioner's federal claim, it is clear that the court of appeals rejected the conspiracy argument on federal grounds, and when a federal issue was decided by the court whose judgment is under review, this Court presumes it was properly presented. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 185 (8th ed. 2002).[2]

Alenia states (at 11-12) that petitioner did not raise any conspiracy-related issues when seeking discretionary review in the Supreme Court of Texas. That is true, but it provides no procedural or prudential basis for denying review. As a procedural matter, there is no dispute that petitioner asked the Supreme Court of Texas to review the court of appeals' resolution of his federal claim that Texas may assert jurisdiction over Alenia. As a prudential matter, even if petitioner's federal claim were narrowly defined solely in terms of the conspiracy issues, it would have been futile to ask the Supreme Court of Texas to review those issues given the statutory limits on that court's discretionary jurisdiction. Specifically, given *National Industrial Sand*'s controlling status in Texas, petitioner could have obtained discretionary review of the conspiracy issues only by convincing the Supreme Court of Texas to reconsider *National Industrial Sand* as a question of "importance to the jurisprudence of the state." TEX. GOV'T CODE ANN. 22.001(6). Yet as Alenia itself explained in successfully opposing petitioner's petition for discretionary review, the "importance to the jurisprudence of the state" basis for discretionary review was unavailable to petitioner because Alenia had taken an interlocutory appeal on the under-

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tion issue before the court of appeals was decided under federal law apart from questions of evidentiary sufficiency, which, as discussed above, were decided on state law bases that Alenia no longer can challenge, although it tries to do so.

[2] See also *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914) (stating the "elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided"); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Charleston Federal Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 186 (1945).

lying jurisdictional question, which made the judgment of the court of appeals final by statute. Alenia's Resp. to Pet. for Rev. at iv, 3. Consequently, there was no basis for petitioner to file a petition seeking review of the conspiracy issues given the limited statutory jurisdiction of the Supreme Court of Texas. See *Nash* v. *Florida Indus. Com.*, 389 U.S. 235, 238 n.1 (1967) (treating lower state court decision as relevant decision under § 1257, even when higher state court review was not sought, when state supreme court indicated it lacked appellate jurisdiction for the type of case in question). For these reasons, petitioner's conspiracy issues are properly before this Court, both procedurally and prudentially.

b. ***Significance***. Alenia does not dispute that a long-standing conflict exists on the imputation issue, nor does it defend the fact that Texas has adopted the minority view that federal due process precludes the imputation to Alenia of the actions of its co-conspirators even though substantive law would impose liability on it for those same actions.

On the actual participation issue, Alenia claims (at 15 n.12) that no conflict exists because *National Industrial Sand* did not hold that actual participation in a conspiracy cannot form a basis for jurisdiction. But in that case, the Supreme Court of Texas expressly announced the following standard: "[W]e decline to recognize the assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state." 897 S.W.2d at 773. To be sure, that case was easy for that court to resolve under the announced standard because the plaintiff lacked proof that the defendant had been part of such a conspiracy. But the ease with which the court decided the case does not change the standard it announced, and the same standard was applied by the court of appeals here when it held that a defendant's actual participation in a conspiracy to harm a forum resident did not suffice to establish specific jurisdiction.[3]

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[3] Alenia otherwise argues (at 10 n.8) that the conflict of authority on this issue is not as deep as it appears because the two decisions

c. ***Merit.*** As explained above, Alenia's brief re-argues many of the same challenges to the trial court's factual findings that Alenia unsuccessfully raised in the court of appeals. In particular, Alenia argues (at 13-15) that there was no evidence of its actual or imputed participation in a conspiracy to oust USRT from the parties' joint venture. In so arguing, Alenia stresses (at 13-14) that mere allegations should not suffice to prove a conspiracy. Petitioner agrees and reiterates that the court of appeals did not reject his claims because they were based on a lack evidence; it rejected them because it decided that Alenia's actual or imputed participation in the conspiracy was legally irrelevant. As a result, it erroneously gave no weight to petitioner's evidence that Alenia directly was involved in a plan to bribe USRT's management (actual participation) and indirectly was involved when that bribe was offered to petitioner and Jon Reed via Alenia's co-conspirators (imputed participation).[4]

Alenia claims (at 15) that the imputation of its co-conspirator contacts would not advance petitioner's case because the court of appeals discussed only one potential "in Texas" contact that might be imputed, a phone call between Siniscalchi and petitioner. But as previously explained, impu-

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that agree with *National Industrial Sand* were intermediate court decisions from other states. But this Court considers such decisions when deciding to address conflicts of authority. See *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 415 n.5 (1998). Conversely, if those other cases were not counted, it would simply suggest that Texas's position is even more of an outlier than it already appears, further suggesting that review by this Court is warranted.

[4] Alenia also claims (at 6-7 & n.7) there was no evidence that it breached its fiduciary duties in 1999 by launching a satellite before purportedly canceling any joint venture agreement. In so arguing, Alenia stresses a document concerning its activities in 2001. *Ibid.* (citing SCR 276). While that document reflects Alenia's further involvement in satellite activities, petitioner did not rely on it to show that Alenia launched a satellite in 1999. That fact was separately shown by affidavit evidence that Alenia never successfully challenged in either lower court. Pet. 5 (citing SCR 125).

tation would not simply impute to Alenia the "in Texas" contacts of its co-conspirators (which admittedly may be few) but also all of their "Texas directed" contacts, such as the coerced sale of USRT and the termination of USRT's loyal management. Pet. 16. Nor is it surprising that the court of appeals failed to discuss such contacts, given its holding that an individual's forum-directed participation in a conspiracy was irrelevant to the jurisdictional inquiry.

In sum, the court of appeals decided that Alenia's actual and imputed participation in a conspiracy to harm a forum business was jurisdictionally irrelevant under federal law, and the Supreme Court of Texas lacked statutory jurisdiction to grant review based on such issues as Alenia's briefing to that court itself explained. Because these issues implicate two longstanding splits of authority, this Court should grant the petition. Alternatively, if this Court decides to address these issues in another pending case, see Pet. 14 & n.5, 29-30 (noting *Mackey* v. *Compass Mktg., Inc.*, No. 05-1433), it should hold this petition pending the resolution of that case.

2. *Whether courts must collectively weigh a defendant's contacts implicates a longstanding split of authority.*

Alenia agrees (at 16) that courts must collectively weigh a defendant's contacts but denies (at 18) that any conflict exists on this because the minority-view cases petitioner cited were intermediate state court decisions. As noted above, *supra* note 3, this Court counts such decisions when considering conflicts. Further, in two of the cited cases (*TeleVentures* and *Shell Compañia Argentina de Petroleo*), the Supreme Court of Texas denied review as it did here, see Pet. 9, 21, 22, thus making those decisions ones from the highest state court in which a decision could be had. 28 U.S.C. § 1257(a). Finally, even if the posture of those decisions meant they do not establish a technical conflict, they still demonstrate the unresolved status of an important federal issue, which also provides a basis for review as well. See SUP. CT. R. 10(c).

Alenia otherwise claims (at 16 n.13, 17) that these courts of appeals applied the correct "collective" standard. But none

purported to apply such a standard and Alenia's only "proof" to the contrary is that, in each case, the plural term "contacts" appeared somewhere in the court's conclusion that the relevant defendant's "contacts" did not support jurisdiction. *Id.* at 17. As previously shown, however, the actual analysis employed by each of those courts was the same as applied by the court of appeals here, which examined Alenia's Texas contacts in isolation from each other and the litigation as a whole. Pet. 20-23. To say a court can cure such a flawed analysis by using the word "contacts" in its conclusion elevates form over substance.

Alenia finally argues (at 18) that even if these decisions are wrong, they just evidence isolated errors on an established legal principle. But the only cases Alenia cites (at 16) for the proposition that collective analysis is "established" are cases from lower federal courts. Thus, even if such analysis finds support in this Court's precedents, it is not clearly "established," especially given the contrary view that has been repeatedly invoked by Texas courts to dismiss claims against nonresident defendants under the guise of federal due process restrictions. Moreover, given the Supreme Court of Texas's repeated denials of review in such cases, this conflict of authority warrants final resolution by this Court.

3. Whether a defendant may characterize its voluntarily in-state business as the "unilateral activity" of another implicates a longstanding split of authority.

Alenia claims (at 20-21 & n.14) that there is no conflict on the unilateral activity issue because the cases that properly apply the principle have done so in deciding specific jurisdiction questions while the cases that improperly apply it have done so in deciding general jurisdiction questions. That is true but irrelevant to the existence of a conflict because regardless of whether a court is conducting a general or specific jurisdiction analysis, the court's threshold task is the same: determining the universe of relevant forum contacts. And it is during this task common to both types of jurisdiction that the unilateral activity principle is employed. Alenia offers no authority suggesting that the principle should apply

differently based on the type of jurisdiction asserted, and this Court has applied the principle uniformly in both. See *Helicopteros Nacionales de Colombia*, 66 U.S. at 417 (general jurisdiction); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980) (specific jurisdiction).

Alenia otherwise argues (at 19) that the court of appeals did not wholly ignore Alenia's Texas contacts under its third-party agreements but merely viewed them as "substantially diminished" in relevance. In fact, this "substantially diminished" treatment amounted to zero weight given the court's conclusion that Alenia lacked sufficient contacts for general jurisdiction even though its in-forum and forum-directed business contacts were undeniably continuous and systematic throughout the period in question. Pet. 5-6. Alenia also insinuates (at 8, 20) that it did not know in advance that it would have to perform work in Texas before it entered the relevant agreements, but the court of appeals held that it did, App. 22, and as with Alenia's other factual disputes, that determination cannot be re-litigated here.

Because the court of appeals' decision implicates the minority view of another longstanding conflict of authority on this jurisdictional issue, this Court should grant the petition.

4. The court of appeals' resolution of the "fair play" issue does not independently support its judgment because a correct resolution of that issue depends on a correct resolution of the minimum contacts issue.

Alenia argues (at 9, 23 & n.16) that the fair play analysis is independent of the minimum contacts analysis, but its authority is a concurrence in *Asahi* that six Justices did not join. Further, that concurrence suggests only that the fair play question sometimes can be answered without a minimum contacts analysis. In cases like *Asahi*, where neither party had ever had a business presence in the forum, that makes sense. See 480 U.S. at 116 (Brennan, J., concurring in part and concurring in the judgment) ("This is one of those rare cases in which 'minimum requirements inherent in the concept of "fair play and substantial justice" ' . . . defeat the reasonable-

ness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." (quoting *Burger King*, 471 U.S. at 477-478)). Here, however, USRT was a Texas business implementing an innovative business plan conceived and developed by Texans in Texas, while Alenia, a foreign business, conducted substantial work in Texas under lucrative third party contracts. As next explained, these facts demonstrate why the fair play analysis here depends on a correct resolution of the minimum contacts issue.

As Alenia acknowledges (at 24), USRT's lack of a current Texas presence was a primary fact motivating the court of appeals' fair play decision. By relying on that fact, however, the court of appeals erroneously gave no weight to Texas's interest in protecting an entrepreneurial business from a foreign conspiracy whose object was to usurp that business's innovative business plan and eliminate its Texas presence, and this error flowed inexorably from the court of appeals' prior determination that Alenia's participation in such a conspiracy was irrelevant to the jurisdictional inquiry. Likewise, the court erroneously gave no weight to Texas's interest in regulating foreign entities that do substantial business in the forum and further failed to recognize that Alenia's burden of defending against litigation in the forum was correspondingly less than entities with no Texas presence at all. These errors followed from the court's refusal to give any weight to Alenia's in-state presence in its general jurisdiction analysis. As a consequence, if either of the court of appeals' minimum contacts determinations were reversed, the outcome likely would change because the forum interests the court ignored show that this is not one of the "rare" cases noted above, especially given the intentionally tortious nature of the underlying conduct. The court of appeals' fair play determination is thus not an independent basis supporting its judgment.

CONCLUSION

For the foregoing reasons and those previously presented, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2006